(2)

No. 87-1547

In The

Supreme Court of the United States

October Term, 1987

CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL AND MEDICAL EMPLOYEES UNION LOCAL 911, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

vs. *Petitioner,*

ABRAHAM GHEBRESELASSIE,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. THIS MATTER SHOULD NOT BE REVIEWED BY THIS COURT

A. PROPERLY FRAMED, THE ISSUE INVOLVED IN THIS CASE IS MUCH NARROWER THAN FRAMED IN THE BRIEF OF THE PETITIONER AND DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION FOR THIS COURT'S REVIEW

The Petitioner-union ["Local 911" herein] states, in its petition to this Court, that the question presented is whether an employee-union member possesses standing to "vacate/confirm" an arbitration award, contrary to the position of his exclusive collective bargaining representative, in the absence of a finding of unfair representation [Pp. i, 5, Petition]. However, the Respondent-employee ["Ghebreselassie" herein] certainly did not seek to "vacate" the award in this case. Moreover, he did not directly seek to "confirm" the award, but rather appealed from an order vacating same. In view of those facts, and to that extent, at least, the issue has not been accurately framed by Local 911.

The issue in this case, properly framed, is:

> Whether a plaintiff/union member, in his action against his employer for wrongful discharge, under Section 301 (*Labor Management Relations Act*, Section 301(a) [29 U.S.C., Sec. 185(a)]), and against his union alleging breach of the duty of fair representation ["DFR" herein] for failure to file a timely grievance on his behalf, has standing to appeal an order, made pursuant to his union's motion in said action, vacating an arbitration award which determined that plaintiff was discharged without just cause and that the grievance was not timely filed

by the union, findings favorable to the employee in the context of said action.

Significantly, Ghebreselassie actively participated in the arbitration proceeding, and is the plaintiff in the "hybrid" Section 301 Wrongful Discharge/Breach of the DFR, district court action. Local 911 filed a Cross-Claim in said action to vacate the arbitration award. Thereafter, during the litigation and, over the objection of Ghebreselassie, Local 911 made a motion to set the award aside. The trial court granted the motion. Plaintiff appealed from that order and from other adverse trial court rulings.

The Court of Appeals of the Ninth Circuit ["C.A." herein] reversed the trial court order vacating the arbitration award, which contained a determination that Ghebreselassie had been discharged without just cause, in violation of the applicable collective bargaining agreement, and that the grievance was not timely filed by his union, findings arguably favorable to Ghebreselassie in the context of his district court action. Since the two primary elements of proof, in Ghebreselassie's district court action against the employer and Local 911, are (1) that he was discharged without just cause in violation of the applicable collective bargaining agreement, and (2) that his union breached the DFR, the findings contained in the arbitration award were favorable to Ghebreselassie in the context of said action, even though the ultimate result of the award was to deny him a remedy because the grievance was untimely.

Clearly, Ghebreselassie did not vacate or attempt to vacate the award, as suggested by Local 911 in its

brief. Moreover, he did not directly attempt to confirm the award, but rather simply appealed from an order vacating same. On appeal, relying on well established precedent regarding the finality of arbitration awards, Ghebreselassie argued that the award was improperly set aside because the award was well within the scope of the submission to the arbitrator by the parties, was based on a plausible interpretation and construction of the collective- bargaining agreement, and thus, should be final and binding based on well established principles of federal labor law. In agreeing with Ghebreselassie's position, and reversing the order vacating the arbitration award, the C.A. did not depart from established law but rather followed it. With respect to the "standing" issue, the Court of Appeals correctly observed that:

> "The fact that an individual employee could not have demanded that his union arbitrate his grievance under the contract does not determine whether he can *appeal an order vacating an award in his favor*. This is especially true where, as *here, the employee was named a party in the proceeding below*. (citation omitted)
>
> The union has not cited any case or other authority to support its assertion that an employee in a section 301 action lacks standing *to appeal an order vacating an arbitration award*."
>
> *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d at 897. Emphasis added.

Local 911 argues that, based on the C.A. decision, a mere allegation of breach of the union's DFR "will cloak an employee with power to directly vacate/confirm an

adverse arbitration decision" [P. 7, Petition]. It is submitted that the decision of the C.A. in this case neither suggests nor stands for such a broad or sweeping proposition, and, since Ghebreselassie is not attempting to, either vacate, or directly confirm the award, the issue of whether an employee can "vacate/confirm" an arbitration award, absent a finding of breach of the union's DFR is not raised by the particular facts involved in this case.

This Court need not consider whether Ghebreselassie must *prove*, rather than simply *allege* that Local 911 breached the DFR as a prerequisite to attacking the arbitration award, because the facts of this case do not involve, as do the numerous cases relied on by Local 911, an employee's attempt to vacate an arbitrator's award. Thus, Local 911's argument that the C.A. decision has "seriously eroded" the finality effect that must be given to arbitration awards [P. 7, Petition] is not well placed in that the C.A., at Ghebreselassie's urging, upheld the award.

Although Local 911 submits that an employee "must rely upon the union to represent his interests and properly exhaust his contractual remedies on his behalf" [P. 6, Petition], Ghebreselassie could no longer reasonably rely on Local 911 to protect his interests at the point in time that he appealed the order vacating the arbitration award. In fact, once Ghebreselassie had filed suit alleging a breach of the DFR, relying in part on the findings of the arbitrator, the interests of Ghebreselassie and Local 911 were clearly adverse and conflicting, and the rationale of the protection afforded by the union's DFR no longer applied. See *Freeman v.*

Local Union No. 135, Chauffeurs, Etc., 746 F.2d 1316 (7th Cir. 1984).

In the case of *Freeman v. Local Union No. 135, Chauffeurs, Etc.*, supra, 746 F.2d 1316, 1321-1322, the court, in holding that a union's DFR does not extend to its decision to vacate an arbitration award, observed that once the arbitrator denied plaintiff's grievance, the rationale for the DFR "evaporated", and concluded that the union member no longer needed the "protection" afforded by the DFR because he then had access to extra-contractual remedies. The court further noted that:

> "That being the case, the union owed plaintiff no duty in deciding whether to seek judicial review of the committee's ruling because, with respect to that decision, it was not acting as his exclusive representative. The union was under no duty to provide Freeman with more legal assistance than bargained for in the contract or required by law".

Similarly, it is submitted that in this case, the conflicting positions of Local 911 and Ghebreselassie occurred at a point in time after the protection afforded by the DFR had "evaporated", and Ghebreselassie was properly permitted to appeal the order vacating the arbitration award.

Under Rule 17 of this Court, outlining the factors which should be considered by this Court in determining whether to exercise its discretion to grant a petition for writ of certiorari, the challenged decision should either conflict with the decision of another decision of this court or with a federal court of appeals or state court of last resort, on the same matter; or, should

decide an important question of federal law which has not been, but should be settled by this Court. It is respectfully submitted that neither of said factors exist in this case.

B. THE NINTH CIRCUIT DECISION IN THIS CASE DOES NOT DEPART FROM WELL ESTABLISHED EXISTING FEDERAL LABOR LAW AND DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The petition herein incorrectly states that this case is "the first appellate court decision announcing an employee possesses standing to independently and directly vacate/confirm an arbitration award". Significantly, (1) Ghebreselassie did not *vacate* or attempt to vacate the award; and, (2) Ghebreselassie did not directly confirm the award. Rather, Local 911 was the party vacating the award and Ghebreselassie simply appealed the order vacating the award. Accurately framed, the C.A. holding in this case does not conflict with either of the cases cited by Local 911.

The case of *Acuff v. United Paper Makers and Paper Workers*, 404 F.2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987, 89 S.Ct. 1466, 22 L.Ed. 762 (1969), cited by Local 911, as conflicting with the decision in this case, involved an attempt by employees whose grievances had been denied, to *intervene* in an action brought by the union under Section 301 of the *LMRA*, in an attempt *to vacate* the adverse arbitration award. The court denied the motion to intervene. This

case is readily distinguishable from the *Acuff* case in that here, (1) Ghebreselassie was not attempting to vacate the arbitration award but instead was simply appealing from an order vacating the award; and (2) Ghebreselassie was not attempting to intervene in a pending action between his union and the employer but was actually the plaintiff in the action.

In the case of *F. W. Woolworth Co. v Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), cert. denied, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981), cited by Local 911, as conflicting with the decision in this case, the court concluded that employee-union members *did have standing* to intervene and appeal in an action brought by the employer to vacate an arbitration award favorable to the employees, where the union did not seek appellate review of the trial court order vacating the arbitration award. Neither this case, nor the *Woolworth* case involves an attempt to *vacate* or attack an arbitration award. Moreover, the *Woolworth* case actually permitted the employees to intervene in an action to uphold an award favorable to them.

It is submitted that the decision of the C.A. in this case is not in conflict with the decision of the Seventh Circuit in the *Woolworth* case to any extent. In fact, the C.A. in this case cited the *Woolworth* case in support of its holding. See *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d 892 at 897.

In the case of *Freeman v. Local Union No. 135, Chauffeurs, Etc.*, supra, 746 F.2d 1316, 1321, cited by Local 911 in its Petition, the court noted that the union

member had the right to file suit to vacate the committee's decision "as long as he exhausted the contract's grievance procedure and *alleged* that Local 135 breached its DFR" during the arbitration process.

The case of *Andrus v. Convey Co.*, 480 F.2d 604, 606 (9th Cir. 1973), cited by Local 911, is likewise readily distinguishable from this case, because it involved an action by union members seeking to *overturn* an arbitration decision. The court simply concluded that an employee could not *attack* the arbitration decision except on the grounds of fraud, deceit or breach of the DFR, or unless the grievance procedure was "a sham, substantially inadequate, or substantially unavailable". The *Andrus* case was cited by the C.A. in this case in noting that, an employee who alleges that his union breached the DFR "has standing to litigate the propriety of an arbitration award in an action brought under Section 301". *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d at 897. See also *Vosch v. Werner Continental, Inc.*, 734 F.2d 149, 154 (3d Cir. 1984), cert. denied, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed. 779 (1985).

The case of *Anderson v. Norfolk & Western Railway Co.*, 773 F.2d 880, 882 (7th Cir. 1985), cited by Local 911, is also clearly distinguishable from this case. There, the court held that employees had no standing to sue to *vacate* an arbitration award, where they had not participated in the arbitration proceeding, had been represented by their union and where they did not "allege" fraud, deceit or breach of the DFR.

2. CONCLUSION

For all of the reasons discussed herein, it is respectfully submitted that this Court should not grant the petition for writ of certiorari to review the decision of the Court of Appeals of the Ninth Circuit in this matter.

DATED: June 6, 1988

Respectfully Submitted

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